Morley Investments and Construction, Inc. ***and*** **Building Trades Organizing Project.** Case 28–CA–14900

April 24, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On March 31, 1999, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge's dismissal of the complaint, which alleges that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union. In so doing, we rely only on the judge's finding that the General Counsel failed to establish that a majority of unit employees raised their hands when asked by the Respondent's operations manager, Roy Morley II, on June 30, 1997, whether they had signed union authorization cards. In making that finding the judge credited two of the General Counsel's witnesses, Jose Provencio (who testified that 9 or 11 employees raised their hands) and Tom Singleton (who testified that 8 or 9 employees raised their hands). However, the judge was unable to credit the testimony of one employee over the testimony of the other and therefore could not find conclusively that at least nine employees raised their hands in response to the poll. Thus, even assuming, as argued by the General Counsel that the unit on the date of the poll was comprised of 16, rather than 17, employees as found by the judge, the judge's inability to find on the basis of credibility that at least nine employees raised their hands warrants a finding that the General Counsel has not carried his burden of proving that the Union's majority status was established by the Respondent's poll. See *Blue Flash Express*, 109 NLRB 591, 592 (1954).

Because we agree with the judge's finding that the General Counsel did not prove that the Union's majority status was established by the Respondent's poll, we shall dismiss the complaint on that basis. Accordingly, we find it unnecessary to pass on the judge's alternative findings that (1) the General Counsel was precluded from proceeding in this matter because of a settlement agreement in Case 28–CA–14619; and (2) that the Board's rationale in *Tennessee Shell Co*., 212 NLRB 193 (1974), petition for review denied sub nom. mem. *Carpenters, Southern Council of Industrial Workers v. NLRB*, 515 F.2d 1018 (D.C. Cir. 1975), requires dismissal of the complaint.

The General Counsel has renewed his motion to strike portions of Respondent's posthearing brief, on which the judge failed to rule. The portions of that brief that the General Counsel requests be stricken substantially involve the settlement bar issue. Because, as stated above, we are not passing on that issue in dismissing the complaint, we deny the General Counsel's motion.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Nathan Albright, Esq., for the General Counsel.
Gary Burnett, Esq., of Las Vegas, Nevada, for the Respondent.
James E. Sala, Director of Organizing, Southern California-Nevada Regional Counsel of Carpenters, of Las Vegas, Nevada, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge**.** Pursuant to notice, a hearing in this matter was held before me in Las Vegas, Nevada, on January 21, 1999. The charge was filed on December 19, 1997, by Building Trades Organizing Project (BTOP or the Union). On February 25, 1998, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Morley Investments and Construction, Inc. (Respondent) of Section 8(a)(5) of the National Labor Relations Act (the Act). The Respondent, in its answer, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel) and counsel for the Respondent. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Nevada corporation with its principal place of business located in Las Vegas, Nevada, where it is engaged in business as a construction contractor performing concrete projects within the construction industry in and around Las Vegas, Nevada. In the course and conduct of its business operations the Respondent annually receives gross revenues in excess of $500,000 and annually purchases and receives goods and materials valued in excess of $50,000 from enterprises located within the State of Nevada, which enterprises received said goods and materials directly from points outside the State of Nevada. On the basis of the foregoing, I find that the Respondent is engaged in commerce or in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that at all material times the Union, an organization comprised of various individual labor organizations, has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The principal issues raised by the pleadings are (1) whether the matter raised by the complaint is inextricably related to a prior Board case that has been settled, and that therefore the Regional Office should be precluded from proceeding with the instant matter, and (2) whether the Respondent has violated

Section 8(a)(5) of the Act by failing and refusing to recognize and bargain with the Union as the collective-bargaining agent of the Respondent's employees.

B. The Facts

On November 26, 1997, the Regional Director for Region 28 approved an all-party settlement agreement in Case 28–CA–14619. The notice to employees that was required to be posted pursuant to the terms of the settlement agreement is quite extensive, and resolves various alleged violations of Section 8(a)(1) and (3) of the Act, and contains, inter alia, the following language:

> WE WILL NOT poll our employees or interrogate our employees by asking them if they have signed union authorization cards on behalf of the **BUILDING TRADES ORGANIZING PROJECT** (herein called the Union), or any other labor organization.

The settlement agreement contains the following language:

> **SCOPE OF THE AGREEMENT—**This agreement settles only the allegations in the above captioned case(s), and does not constitute a settlement of any other case(s) or matters. It does not preclude persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters which precede the date of the approval of this agreement regardless of whether such matters are known to the General Counsel or are readily discoverable. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board, and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

The aforementioned language contained in the notice to employees resolved an incident on June 30, 1997, during which Roy Morley II, the Respondent's operations manager and son of the Respondent's owner, Roy Morley Sr., asked certain assembled employees whether they had signed union cards, and wrote down the name of each employee who had raised his hand affirming that he had signed a union card. Thereafter, on August 6, 1997, the Union, by hand delivery, certified mail and fax, delivered and sent the following letter to the Respondent:

> The Building Trades Organizing Project is a workers' advocacy organization comprised of over fifteen construction unions in the Las Vegas Area.
>
> . . . .
>
> We support constructive, harmonious, and fair relationships between management and labor. The ideal relationship between construction workers and their managers is one of mutual trust and respect.
>
> However, we believe you or your agents may have violated this principle in the following manner.
>
> It is our understanding that on or about June 30, 1997, in Las Vegas, you or your agents personally polled your employees as to whether they had signed union authorization cards and/or supported a union. We would like to advise you that this act might constitute a violation of Section 8(a)(1) and other subsections of the National Labor Relations Act, as amended. In effect, your actions may violate the basic rights American workers have to form, join, or assist labor organizations.
>
> We also understand that in conducting this poll, you determined that a majority of your employees had signed union authorization cards and/or support the union.
>
> In doing so you have established by a method of your own choice, the majority status of our unions under Section 9(a) of the National Labor Relations Act. You have saved your company and its employees the often lengthy and arduous task of establishing a legal and binding bargaining relationship.
>
> Therefore, on behalf of the four unions named above, we offer to commence good-faith collective bargaining with you immediately. This collective bargaining will be on the subjects of decent wages, good family health care and retirement benefits, and other conditions of your employees' work.
>
> I sincerely believe this collective bargaining will benefit both your company and its workers. Please contact me at the above address or call [phone number omitted] within seven (7) calendar days of your receipt of this letter to establish the time and place for our meeting.
>
> Thank you for your attention to this matter. I look forward to meeting and working with you and Morley Construction.

While the record evidence shows that the Union did not request recognition and bargaining with the Respondent prior to June 30, 1997, the parties entered into a stipulation in this matter, inter alia, as follows:

> Respondent admits paragraph 5(e) of the complaint regarding the Charging Party Union's demand for recognition and bargaining made in writing on or about August 6, 1997. Respondent also asserts that between June 30, 1997, and continuing at least up and through August 6, 1997, that the Charging Party Union has orally requested we engage in bargaining by Respondent (sic) on several occasions, and Respondent, through Roy Morley, has informed the Union, on each such occasion, that this was fine but that the Charging Party Union should contact Respondent's counsel in order to arrange a meeting between Respondent and the Charging Party Union.[1]

During the investigation of the aforementioned case, Roy Morley Sr. and Roy Morley II each submitted an affidavit to the Regional Office dated October 27, 1997. Both affidavits were introduced into evidence by the General Counsel. The affidavit of Roy Morley Sr. states, in pertinent part, as follows:

> That upon learning of the activities of the Building Trades Organizing Project on behalf of the labor organiza-

[1] The latter part of this stipulation beginning with, "Respondent also asserts . . ." is confusing. It simply seems to mean that while the Respondent may make such an assertion, the Union and the General Counsel do not necessarily agree with it. The record evidence indicates that in fact no union representative spoke with the Respondent's management or made a demand for recognition until sometime after June 30, 1997, and moreover, that the first such demand was made on August 6, 1997. Indeed, the Respondent's August 6, 1997 letter, does not refer to any prior demand. However, since the Respondent seems to want to "assert" that a bargaining demand was made "between June 30, 1997, and continuing at least up and through August 6, 1997," I accept that assertion. Nevertheless, there is no evidence that the demand was made prior to or even on the same day as the Respondent's interrogation of its employees. Therefore, I find that the demand was made subsequent to June 30, 1997.

tions, I thought it would do no harm to meet with the union folks directly, if that was the wish of my employees. Therefore, I instructed Roy R. Morley II to find out if, indeed, our employees desired representation by these labor unions, and, if so, I would consider meeting and discussing whatever was on their minds.

That neither I, nor any member of my staff or my superintendents, ever threatened any reprisal, retaliation, or any consequence whatsoever to our employees for their solicitation of union representation.

That on Form NLRB 501, the labor union organizer indicates our employees desire that the Company engage in collective bargaining with these sundry unions, and therefore, claims our failure to engage in such collective bargaining is violative of statutorily protected rights. Since the Company has never been apprised of such a desire on the part of our employees, either in writing or orally, the alleged abrogation of rights is a legal impossibility.

The affidavit of Roy Morley II states, in pertinent part, as follows:

That no such interference, restraint, or coercion was ever exercised or exerted over any employee of the Company at any time.

That my reason for inquiring of our employees as to whether a preponderance of them desired labor union representation was only for the purpose of facilitating an introduction of the two parties. In other words, if our employees wanted representation, I needed to know in order that I set up a meeting between our management and their representatives.

That I did not "poll" our employees. I simply asked a blanket question and for a show of hands from the group, regarding their desires for a meeting regarding work conditions and whether they wanted to meet with or without union representatives.

And on October 29, 1997, Roy Morley II submitted another affidavit. This one, consisting of seven typewritten pages, was taken by a Board agent and states, in pertinent part, as follows:

On or about June 30, 1997 . . . I visited a Morley jobsite located in Henderson, Nevada. I gathered the employees for a quick meeting and asked for a show of hands as to how many of them had signed union authorization cards. I believe that of a total of 8 combined Morley employees, 5 had indicated by raising their hand that they had signed union authorization cards. I do not recall asking the employees why they had signed union authorization cards. I would like to note that Morley had a total complement of about 24 employees at this time. Moreover, 3 of the 8 employees I questioned about signing a union card were either Morley managers or supervisors. As I have indicated in attachment A,[2] my only reason for asking employees if they desired union representation was to determine if a preponderance of our employees desired that management meet with or without union representatives regarding work conditions and/or setup a meeting between our management and their representatives to discuss employee working conditions. I deny that I ever threatened employees with reprisal or retaliation because they engaged in union organizing activities or signed union authorization cards on behalf of the union. I deny that I ever told employees that the company would close down if the union was voted in.

Former employee Tom Singleton testified that on June 30, 1997, he was working at a jobsite along with "at least nine or 10 or more, at least that" rank and file employees, excluding foremen or supervisors, when Roy Moryley II came out to the site and assembled the employees for a meeting after work that day. Morley, according to Singleton, simply asked every employee who had signed a union card to raise his hand. Then, he again asked each person who had raised his hand whether he had signed a union card. As they answered "yes" he wrote down their name. Singleton testified that "about eight or nine" employees raised their hand. He also testified that he has not been asked about this matter until about 2 weeks prior to his testimony, that is some 19 months after the event in question. The meeting lasted about 5 or 10 minutes at the most. Morley did not say why he was asking for a show of hands.

Former employee Jose Provencio[3] testified regarding the aforementioned meeting. According to Provencio there were "like nine, 11 I think" rank and file employees present, and "all the workers" raised their hands in response to Morley's question. Then Morley wrote something on a piece of paper. Provencio testified that he believed there were a total of around 15 individuals at the meeting. There was also a discussion of insurance and other matters, and the meeting lasted about 20 minutes. This was the first meeting that was held about union representation, and Provencio affirmed that at that point in time he did not "get the impression from any supervisor that Morley Construction was against union representation and that if you participated in that [show of hands] they were going to retaliate." However, after the show of hands was recorded, according to Provencio, Morley told the employees "that the Union is no good because they don't have enough jobs for everybody, you know, because there was a lot of people . . . on the list to go to work for [the] Union." Provencio is simply relying on his memory of the event.

It was stipulated that if it is found that the Respondent has a bargaining obligation, the appropriate union for collective bargaining is as follows:

All full time and regular part-time carpenters, finishers, and laborers employed by the Respondent at its jobsites in and around Las Vegas, Nevada, excluding all other employees, office clerical employees, estimators, professional employees, guards, and supervisors as defined in the Act.

It was further admitted by the Respondent that as of June 30, 1997, there were 17 unit employees employed by the Respondent.

Roy Morley II testified that he went out to the jobsite on June 30, 1997, on his own volition and was not instructed to hold such a meeting. He recalls that there were eight rank and file employees present. He asked them, "Hey, guys, I'd like to know who signed the union cards." He did this, "just for my own information," and testified that he wanted to see how many people had signed cards "to see if we were bargaining with the Union or with my employees." He wrote down the names of those who signed cards, and said, "Thanks a lot guys. See you

[2] "Attachment A" was apparently Morley's prior October 27, 1997 affidavit.

[3] Provencio was a discriminatee who received backpay as a result of the settlement in the prior matter.

tomorrow." Then he left. He recalled that one or two of the eight employees did not raise their hand. He threw the list away because "I didn't care about it." The meeting lasted no more than 5 minutes. This was the only item of business, and there was no other discussion about the Union. Morley further testified that of the total nonsupervisory employee complement as of June 30, 1997, only three to five of those individuals are currently employed.

C. Analysis and Conclusions

The Respondent has consistently maintained that the subject matter of this proceeding has been resolved in the prior proceeding pursuant to the terms of the aforementioned settlement agreement, and that therefore the matter is res judicata. It is apparently the position of the General Counsel that only the matter of the unlawful polling of employees regarding their signing of union authorization cards, alleged to be violative of Section 8(a)(1) of the Act, has been resolved in the prior proceeding, and that the issue involving recognition of the Union, albeit as a direct result of the very same polling, is a separate and distinct matter under Section 8(a)(5) of the Act and was not resolved in the prior proceeding.

The record evidence strongly indicates that, in fact, the recognition issue was one of the matters that was under consideration by the Regional Office during the investigation of the prior proceeding. Thus, on August 6, 1997, the Union delivered to the Respondent a detailed account of its unlawful polling, stated that, "[w]e would like to advise you that this act might constitute a violation of Section 8(a)(1) and other subsections of the National Labor Relations Act, as amended," and demanded recognition and bargaining. According to the complaint in that proceeding the Union filed the initial charge in Case 28–CA–14619 on August 26, 1997, and subsequently, on August 27, 1997, and again on October 31, 1997, filed amended charges.

During the investigative stage of that proceeding, Roy Morley Sr. submitted an affidavit, dated October 27, 1997, stating, inter alia:

> That on Form NLRB 501,[4] the labor union organizer indicates our employees desire that the Company engage in collective bargaining with these sundry unions, and therefore, claims our failure to engage in such collective bargaining is violative of statutorily protected rights. Since the Company has never been apprised of such a desire on the part of our employees, either in writing or orally, the alleged abrogation of rights is a legal impossibility.

Further, the affidavit of Roy Morley II taken by a Board agent on October 29, 1997, goes beyond the Section 8(a)(1) polling issue. Thus, it states, inter alia:

> On or about June 30, 1997 . . . I visited a Morley jobsite located in Henderson, Nevada. I gathered the employees for a quick meeting and asked for a show of hands as to how many of them had signed union authorization cards. I believe that of a total of 8 combined Morley employees, 5 had indicated by raising their hand that they had signed union authorization cards. I do not recall asking the employees why they had signed union authorization cards. I would like to note that Morley had a total complement of about 24 employees at this time. Moreover, 3 of the 8 employees I questioned about signing a union card were either Morley managers or supervisors. As I have indicated in Attachment A, my only reason for asking employees if they desired union representation was to determine if a preponderance of our employees desired that management meet with or without union representatives regarding work conditions and/or set up a meeting between our management and their representatives to discuss employee working conditions.

From the foregoing it seems reasonable to conclude that the recognition issue was a matter that was investigated during the prior proceeding and, indeed, may even have been alleged in a charge or amended charge filed by the Union. I so find.[5]

The scope of agreement section of the settlement agreement in the prior proceeding contains the following language:

> **SCOPE OF THE AGREEMENT—**This Agreement settles only the allegations in the above captioned case(s), and does not constitute a settlement of any other case(s) or matters.

I conclude that one of the "allegations" in that proceeding was the recognition issue. Thus, it appears that such a specific allegation was either embodied in a charge or amended charge, and/or the Respondent was reasonably led to believe that such an allegation had been advanced as the Board agent taking the affidavit of Roy Morley II included facts that only seem relevant to the recognition issue.[6] Accordingly, I find that the recognition issue either was or was reasonably believed to be an "allegation" in the prior proceeding, and that therefore the Respondent was relying on a reasonable belief that that issue had been laid to rest by the settlement of that case. It seems fundamentally unfair to require the Respondent, under these circumstances, to litigate the matter anew. Accordingly, I shall dismiss the instant complaint on this basis.

I find that on June 30, 1997, the date that Roy Morley II pursuant to his father's instruction, counted and wrote down the names of employees who had signed union authorization cards, the Respondent's employee complement in the appropriate unit consisted of 17 unit employees. The testimony of employees Singleton and Provencio is not consistent: Singleton testified that, "about eight or nine" employees raised their hands, and Provencio testified that, "like 9, 11 I think" raised their hands. The General Counsel subpoenaed the relevant records from the Respondent which would show the jobs on which they were working at times material herein, and the Respondent has not produced the said documents. Moreover, Roy Morley II testified that the timecards would show which employees were working at each particular jobsite on June 30, 1997. While the fact that the Respondent did not produce the subpoenaed materials requires that the General Counsel's evidence be credited, it matters a great deal whether only eight employees, or nine or more employees, raised their hands; if only eight raised their hands, then no majority has been established. Under the circumstances, and given the fact that both Singleton and Provencio were recollecting an event that took place some 19 months

[4] This is the standard "charge against employer" form utilized by charging parties to bring charges against employers.

[5] Whether or not this is correct is a matter of record that would seem to be readily verifiable, and if incorrect, the General Counsel may so advise the Board in its exceptions.

[6] I recognize that it is possible that Morley, while giving his affidavit, may have insisted that the Board agent include information which the Board agent deemed irrelevant to the investigation; however, it is clear that Morley, at least, was concerned that the recognition issue was viable at the time.

prior to the hearing, I am unable to credit one witness over the other.[7]

Assuming arguendo that a majority of the Respondent's employees did raise their hands, the General Counsel maintains that the Respondent thereafter violated Section 8(a)(5) of the Act by failing and refusing to recognize and bargain with the union. In support of this contention the General Counsel relies on *Sullivan Electric Co.,* 199 NLRB 809 (1972),[8] wherein the Board found as follows:

> In sum, it is abundantly clear that the Respondent's employees voluntarily and freely designated the Union as their representative for the purposes of collective bargaining; that the Union made a clear and proper demand for recognition, a demand which was communicated to and considered by responsible officials of the Respondent; and that the Respondent assured itself through interrogation of its employees that a substantial majority of them had designated the Union as their representative. These circumstances give rise to a bargaining obligation. Accordingly, we find that the Respondent violated the Act by refusing to recognize and bargain with the Union.

In the instant case however, the General Counsel, recognizing that *Sullivan Electric* seems to require that the Union's demand for recognition precede the Respondent's polling of its employees, relies on dictum in a subsequent case, *Tennessee Shell Co.,* 212 NLRB 193 (1974). In that case, like the instant case, the respondent's interrogations preceded the union's request for recognition. The Board majority, with a vigorous dissent by two Board Members, determined that it should not apply the *Sullivan Electric* doctrine for the following reasons:

> Respondent learned in the course of its interrogations that possibly 11 out of the 21 unit employees appeared to support the Union, but had reason to believe that there was some question as to the allegiance of 1 or 2 out of that slender majority. Had Respondent gone on to question enough additional employees to establish by that means an unmistakable majority preference for the Union, we would then have to consider whether the logic and policy of the *Sullivan Electric* doctrine would create a duty to bargain once the demand for recognition was made, even though no demand had been made at the time of the interrogation.

And at fn. 19 of this decision, the Board states as follows:

> We do not "suggest," as our dissenting colleagues state, that *Sullivan Electric* is inapplicable where the interrogations precede the demand for recognition. On the contrary, we leave to a more appropriate case the determination as to what circumstances, if any, might justify applying *Sullivan Electric* to such a situation. We point out, however, that in examining that question we should not be concerned with whether the interrogations themselves are lawful or unlawful, and our inquiry into their purpose or motive should be limited to determining whether they constitute an employer-selected substitute for a Board election, which is the proper inquiry under *Sullivan Electric*.

According to the General Counsel, the instant case is the proper vehicle for presenting the issue that the Board declined to answer in *Tennessee Shell*. I do not agree. In *Tennessee Shell* it seems the Board majority was anticipating a case wherein the evidence established an "unmistakable majority preference for the Union" so that it could clearly determine whether the *Sullivan Electric* doctrine should be extended to interrogations that predate the demand for recognition. Here, as in *Tennessee Shell*, the Union's majority status is far from clear, and is certainly not "unmistakable." I therefore find, contrary to the General Counsel's contention, that the Board's rationale in *Tennessee Shell* mandates the dismissal of this matter.

Further, as noted above, I have determined that the settlement agreement entered into in the prior proceeding is dispositive of this matter.

On the basis of the foregoing, I shall recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not violated Section 8(a)(5) of the Act as alleged.

On these findings of fact and conclusions of law, I issue the following recommended [9]

ORDER

The complaint is dismissed in its entirety**.**

[7] I specifically discredit the testimony of Roy Morley II that only five or six employees raised their hands.

[8] See also, *Crest Industries Corp.,* 276 NLRB 490 (1985).

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.